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ALIEN ENEMIES AS LITIGANTS.*

The editorial page of my evening paper presents its readers with this rather remarkable piece of misinformation:

RESIDENT ALIENS.

The expected declaration by Congress that a state of war exists between the United States and Germany will automatically alter the status of German subjects residing here. No such person can be accepted as a citizen during the continuance of the war, and our courts will be closed to them, the plea that they are alien enemies being a sufficient answer to any legal remedy they may ask. All commercial partnerships between them and citizens of this country will be dissolved; no patents or copyrights can be issued to them; no moneys due can be transferred to German subjects resident in Germany, and some cases have gone so far as to hold that an action pending in court wherein an alien enemy subject is a plaintiff abates at a declaration of war.

However interesting this may be as an exhibition of editorial sapience, few lawyers having charge of a case for or against a resident alien of enemy nationality will care to take their law from it. The question of the status of such persons as litigants is, however, of considerable present interest; and as it is one with which the present generation of lawyers have happily not heretofore had occasion to become familiar, a résumé of the case law of the subject may be of use to the readers of CASE AND COMMENT.

While it is true that an enemy can neither institute an action during the continuance of war,[1] nor prosecute an action insti-

*Case and Comment, May, '17.

1. Brandon *v.* Nesbitt (1794), 6 T. R. 23, 3 Revised Rep. 109; 2 Eng. Rul. Cas. 649; Alcinous *v.* Nigreu (1854), 4 El. & Bl. 217, 24 L. J. Q. B. N. S. 19, 1 Jur. N. S. 16, 3 Week. Rep. 25; Netherlands South African R. Co. *v.* Fisher (1901), 18 Times L. R. 116; Robinson *v.* Continental Ins. Co. [1915], 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125 [1914], W. N. 393, 59 Sol. Jo. 7; Bassi *v.* Sullivan (1914), 32 Ont. L. Rep. 14; Dumenko *v.* Swift Canadian Co. (1914), 32 Ont. L. Rep. 87; Dangler *v.* Hollinger Gold Mines (1915), 34 Ont. L. Rep. 78; Wilcox *v.*

tuted before its commencement,[2] such disability continues only while he is abiding in his own country;[3] and, accordingly, does not exist where he is permitted to enter or remain in this country.[4] "A lawful residence implies protection and a capacity to sue and be sued."[5]

An alien enemy, as such, is not thereby debarred from resort-

Henry (1782), 1 Dall. 69, 1 L. ed. 41; Mumford *v.* Mumford (1812), 1 Gall. 366, Fed Cas. No. 9,918; Johnson *v.* 13 Bales (1814), 2 Paine, 639, Fed. Cas. No. 7,415; Crawford *v.* The William Penn (1815), Pet. C. C. 106, Fed. Cas. No. 3,372; Elgee *v.* Lovell (1865), Woolw. 102, Fed. Cas. No. 4,344; Chappelle *v.* Olney (1870), 1 Sawy. 401, Fed. Cas. No. 2,613; Russ *v.* Mitchell (1864), 11 Fla. 80; Seymour *v.* Bailey (1872), 66 Ill. 288; Perkins *v.* Rogers (1871), 35 Ind. 124, 9 Am. Rep. 639; Dorsey *v.* Kyle (1869), 30 Md. 512, 96 Am. Dec. 617; Dorsey *v.* Dorsey (1869), 30 Md. 522, 96 Am. Dec. 633; Dorsey *v.* Thompson (1872), 37 Md. 25; Levine *v.* Taylor (1815), 12 Mass. 8; De Jarnette *v.* De Giverville (1874), 56 Mo. 440; Sanderson *v.* Morgan (1868), 39 N. Y. 231, affirming 25 How. Pr. 144; Burnside *v.* Matthews (1873), 54 N. Y. 78; Jackson ex dem. Johnston *v.* Decker (1814), 11 Johns. 418; Griswold *v.* Waddington (1818), 15 Johns. 57; Bonneau *v.* Dinsmore (1862), 23 How. Pr. 397; Cruden *v.* Neale (1796), 2 N. C. (1 Hayw.) 338; Bishop *v.* Jones (1866), 28 Tex. 294; Peerce *v.* Carskadon (1870), 4 W. Va. 234, 6 Am. Rep. 281; Haymond *v.* Camden (1883), 22 W. Va. 180; Porter *v.* Freudenburg [1915], 1 K. B. 857, 5 B. R. C. 548.

2. Le Bret *v.* Papillon (1804), 4 East, 502, 7 Revised Rep. 618; Lucyzcki *v.* Spanish River Pulp & Paper Mills Co. (1915), 34 Ont. L. R. 549; Bell *v.* Chapman (1813), 10 Johns. 183; Robinson *v.* Continental Ins. Co. [1915], 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125 [1914], W. N. 393, 59 Sol. Jo. 7; Canadian Stewart Co. *v.* Perih (1915), 25 Quebec B. R. 158; Currie *v.* The Josiah Harthorn (1862), Fed. Cas. No. 3,491a; Porter *v.* Freudenburg, supra.

3. Seymour *v.* Bailey, 66 Ill. 288.

4. Crawford *v.* The William Penn (1815), Pet. C. C. 106, Fed. Cas. No. 3,372; Otteridge *v.* Thompson (1814), 2 Cranch, C. C. 108, Fed. Cas. No. 10,618; Hepburn's Case (1830), 3 Bland, Ch. 95; Russell *v.* Skipwith (1814), 6 Binn. 241; Viola *v.* Mackenzie, M. & Co. (1915), 24 Quebec B. R. 31, 24 D. L. R. 208.

An alien enemy commorant in the jurisdiction by the license of the government and under its protection may sue, though he came in time of war without a safe conduct. Wells *v.* Williams (1697), 1 Ld. Raym. 282, 1 Salk. 46, 1 Lutw. 34.

5. Clarke *v.* Morey (1813), 10 Johns. 69.

ing to the courts for relief during the continuance of the war, but while permitted to remain in the country is exonerated from the disability of enemy, occupying the same position as any other foreigner, except as to carrying on trade with the enemy country,[6] unless he is a spy or has committed other acts of hostility. And in order to entitle an alien subject of an enemy country, residing within the local jurisdiction, to sue, it is not necessary for him to allege and prove that he is not a spy and has not committed acts of hostility, but the exception should be invoked by the one who relies upon it.[7]

A resident alien of enemy nationality is not debarred from maintaining an action by the circumstance of his internment as a civilian prisoner of war.[8] And a prisoner of war taken in an act of hostility may, it seems, sue while in confinement.[9]

The fact that the plaintiff is a woman whose husband is actually engaged in hostile warfare does not alter the situation where the basis of the action is a right individual to herself.[10]

An action can be maintained by a person of enemy nationality who is neither residing nor carrying on business in an enemy country, but resides in either an allied or neutral country and carries on business through his partners in that allied country.[11]

6. Princes of Thurn and Taxis *v.* Moffitt [1915], 1 Ch. 58 [1914] W. N. 379, 31 Times L. R. 24, 59 Sol. Jo. 26; Bassi *v.* Sullivan (1914), 32 Ont. L. Rep. 14; Oskey *v.* Kingston (1914), 32 Ont. L. Rep. 190; Ragusz *v.* Les Commissaires du Havre de Montreal (1916), 26 Quebec B. R. 87; Volkl *v.* Rotunda Hospital [1914], 2 Ir. R. 543.

7. Viola *v.* Mackenzie, M. & Co. (1915), 24 Quebec B. R. 31, 24 D. L. R. 208.

8. Schaffenius *v.* Goldberg (1915), 113 L. T. 949, affirming 32 Times L. R. 31.

9. See Sparenburgh *v.* Bannatyne (1797), 1 Bos. & P. 163, 2 Esp. 580, 4 Revised Rep. 772, where it was held that a native of a neutral state taken in an act of hostility on board an enemy's fleet is not disabled from suing while in confinement on a contract entered into as a prisoner of war; and in which it was intimated that the same conclusion would have been reached had the plaintiff been an alien enemy born.

10. Princes of Thurn and Taxis *v.* Moffitt, supra.

11. Re Duchess of Sutherland (1915), 31 Times L. R. 248.

But compare Russell *v.* Skipwith (1814), 6 Bin. (Pa.) 241, where the opinion is expressed that the residence of an alien enemy sub-

ALIEN ENEMIES RESIDING IN THE ENEMY'S COUNTRY.

A person of enemy nationality resident in his own country, is, however, under a disability, during the war, to institute or to maintain an action,[12] except upon contracts arising directly or collaterally out of a trade licensed by the sovereign authority of the government in whose courts redress is sought.[13] Such disability is temporary in its nature, and personal, and founded upon reason and policy, and, in a great measure, upon necessity.[14] It is not affected by the circumstance that he sustains the character of consul of a neutral state.[15]

ject in a neutral country cannot form an exception to the reason or policy of the general principle; "because if he can withdraw the money into a neutral country, he may readily transfer it from thence into his own country."

A loyal citizen having a residence in hostile territory, but who leaves the enemy's country at the opening of the war and has his abode during its continuance on loyal or neutral ground, is not to be regarded as an alien enemy and as subject to the disabilities of that position, since money or property recovered by him will not be brought by the recovery within the reach of the enemy and rendered liable to seizure by the enemy for the maintenance of the war. Zacharie *v.* Godfrey (1869), 50 Ill. 186, 99 Am. Dec. 506.

12. See cases cited in footnotes 1 and 2, supra.

13. Crawford *v.* The William Penn (1815), Pet. C. C. 106, Fed. Cas. No. 3,372; United States *v.* 100 Barrels of Cement (1862), Fed. Cas. No. 15,945.

14. De Jarnett *v.* De Giverville (1874), 56 Mo. 440.

In Sparenburgh *v.* Bannatyne (1797), 1 Bos. & P. 163, it was said by Eyre, Ch. J.: "I take the true ground upon which the plea of alien enemy has been allowed is, that a man, professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and the jurisdiction of our courts. Such is the case of an outlaw."

But in Viola *v.* MacKenzie M. & Co. (1915), — Quebec, —, 24 D. L. R. 208, it is said that the restriction of the right to sue does not result from the incapacity of foreigner, but from the fact that the enemy country will profit by executing a judgment in his favor.

"By the policy of the law, alien enemies shall not be admitted to actions to recover effects which may be carried out of the Kingdom to weaken ourselves and enrich the enemy." 1 Bacon, Abr. "Aliens," D.

15. Albretcht *v.* Sussmann (1813), 2 Ves. & B. 323, 13 Rev. Rep. 110.

The common-law rule by which an alien enemy is precluded from enforcing his rights of action during the continuance of war is not abrogated by art. 23 (h) of chap. 1, § 2, of the Annex to the Hague Convention of 1907, by which it is forbidden to "declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings," but such provision is, in view of its collocation, to be read as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or protect their civil rights.[15a]

This disability extends to suits in which the nonresident enemy is the real party in interest. Thus, an action is not maintainable by an agent on behalf of his principal where the principal is an alien enemy;[16] nor may he be appointed as a receiver of the assets of his principal's business for the purpose of enabling him to collect debts due to his principal.[17] So an alien enemy cannot bring suit in the name of a trustee, not an alien, as the public policy which forbids that the property sued for should be carried out of the country to enrich the enemy would be violated equally in the one case as in the other.[18] And it has been held that an action for wrongful death cannot be maintained by the administrator of a decedent where the persons for whose benefit the action is given are alien enemies.[19] Alien enemies are incapable of making a valid demise for the purpose of maintaining

15½. Porter *v.* Freudenberg [1915], 1 K. B. 857, 5 B. R. C. 548.

16. Brandon *v.* Nesbitt (1794), 6 T. R. 23, 3 Revised Rep. 109, 2 Eng. Rul. Cas. 649. But the fact that a suit is prosecuted on behalf of alien enemies by an agent, himself under no disability to sue, cannot be taken advantage of under a plea of the general issue. Flindt *v.* Waters (1812), 15 East, 260, 13 Revised Rep. 457.

17. Maxwell *v.* Grunhut (1914), 31 Times L. R. 79, 59 Sol. Jo. 104.

18. Crawford *v.* The William Penn (1815), Pet. C. C. 106, Fed. Cas. No. 3,372. It has, however, been held that it is no defense to an action that the plaintiff sued in trust for an alien enemy (Daubuz *v.* Morshead (1815), 6 Taunt. 332, 16 Revised Rep. 623). The theory of the latter case doubtless was that the ground of the objection goes rather to the enforcement of the judgment than to the maintenance of the suit.

19. Dangler *v.* Hollinger Gold Mines (1915), 34 Ont. L. Rep. 78.

an action of ejectment.[20]

On the other hand, the fact that one of the plaintiffs, who is merely a nominal party, and who cannot control the suit nor collect the judgment, is a public enemy, is no ground for dismissing the petition of the beneficial plaintiff who is not an enemy.[21] And w ere it is pleaded in abatement that one of the plaintiffs is an alien enemy, the other plaintiff may move to amend his writ by striking out the name of his coplaintiff.[22]

The disability of an alien enemy to sue is so extended as to prevent him from gaining any advantage for himself and his country; and therefore he is not only disabled from suing for the purpose of procuring any immediate relief, but he is not allowed to obtain testimony by a bill of discovery in equity so as thereby to lay a foundation for obtaining relief elsewhere;[23] though where sued he may have a discovery for the purpose of conducting his defense, just as he would be allowed process to compel the attendance of his witnesses.[24]

The right to recover a debt being only suspended during, and not extinguished by, the war, an alien enemy may make a claim in a bankruptcy proceeding, though dividends thereon will be withheld until the conclusion of peace.[25] But an alien enemy resident in the enemy country cannot be heard during the war to complain of the rejection of a claim filed by him against a bankrupt's estate.[26]

Our courts have held that an alien enemy cannot appear as a claimant of libeled property,[27] and an eminent English judge[28]

20. Jackson ex dem. Johnston *v.* Decker (1814), 11 Johns. 418.

21. Hoskins *v.* Gentry (1865), 2 Duv. 285; Mercedes Daimler Motor Co *v.* Handslay Motor Co. (1915), 31 Times L. R. 178, 32 R. P. C. 149, [1915] W. N. 54.

22. Arnold *v.* Sergeant (1783), 1 Root, 86.

23. Hepburn's Case (1830), 3 Bland Ch. 95; Daubigny *v.* Davallon (1794), 2 Anstr 463.

24. Albretcht *v.* Sussmann (1813), 2 Ves. & B. 323, 13 Revised Rep. 110.

25. Ex parte Boussmaker (1806), 13 Ves. Jr. 71, 9 Revised Rep. 142.

26. Re Wilson (1915), 94 L. J. K. B. N. S. 1893.

27. Johnson *v.* 13 Bales (1814), 2 Paine, 639, Fed. Cas. No. 7,415; United States *v.* 1756 Shares (1863), Fed. Cas. No. 15,960a; United States *v.* The Isaac Hammett (1862), Fed. Cas. No. 15,446.

28. Sir Wm. Scott (afterwards Lord Stowell) in The Hoop (1799), 1 C. Rob. 196.

has laid down the rule that a prize court, though a court of nations, is so far a domestic court that an alien enemy cannot sue therein unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. But under the present practice of the English prize courts, any alien enemy claiming any protection, privilege, or relief under a convention of the Hague Peace Conference is entitled to appear as a claimant and argue his claim before the court.[29]

Although there is some conflict of opinion,[30] the better view appears to be that the disability to sue, arising from the fact that the plaintiff is an alien enemy, may not be waived.[31] The

29. The Möwe (1914), 84 L. J. Prob. N. S. 57, [1915] P. 1, 112 L. T. N. S. 261.

30. In McNair *v.* Toler (1875), 21 Minn. 175, where the action was instituted before the war, it was held that the objection that the plaintiff was technically an alien enemy, like all other objections to his capacity to sue, was waived by the omission to plead it in abatement.

And see also Burnside *v.* Matthews (1873), 54 N. Y. 78, where it was said that as the defense is merely technical and dilatory, growing out of a supposed temporary disability, it must, to be effectual, be pleaded specially and with certainty to a particular intent.

It should, perhaps, be pointed out that these decisions, while permitting a recovery of judgment in the absence of objection duly taken, are in no wise inconsistent with the view that the court may, of its own motion, refuse process for its enforcement during the war.

31. In Janson *v.* Driefontein Consol. Mines [1902], A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268, Lord Davey observed that he had some doubt whether the objection of alien enemy might be waived, it being one based on considerations of public policy of which the court should be held bound to take notice. This *dictum* is cited with approval in Bassi *v.* Sullivan (1914), 32 Ont. L. Rep. 14; and a similar doubt was expressed in Robinson *v.* Continental Ins. Co. [1915], 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914], W. N. 393, 59 Sol. Jo. 7.

And in Dorsey *v.* Kyle (1869), 30 Md. 512, 96 Am. Dec. 617, it is said that the plea of alien enemy is not a matter of privilege, but a disability that suspends the right to maintain an action in the courts of the country to which the party is an enemy.

Where, during the pendency of an action, the plaintiff becomes an

objection is not a matter of privilege in the defendant, but is based upon considerations of public policy, of which the court should be held bound to take notice. But the error, if any, in permitting an action brought by an alien enemy to proceed to judgment, becomes immaterial where peace has been concluded.[32]

A plea of alien enemy is defeated by the conclusion of a treaty of peace;[33] and a suit, not being abated during the war, cannot be abated after the conclusion of peace.[34]

Effect of War on Suit Previously Instituted, Judgment Recovered, or Appeal Pending.

In some jurisdictions it has been held that where an action has been commenced before the war, the proceeding is only suspended,[35] whereas a suit brought after the commencement of the war will be dismissed,[36] even though if dismissed the statutory period of limitation may possibly run and so put an end to the action.[37]

In other cases it is held that where the plaintiffs become alien enemies subsequent to the institution of the suit, the action should be dismissed rather than continued on the docket;[38] but the dismissal should be without prejudice.[39]

alien enemy, the court has no legal power to render judgment (Brooke *v.* Filer (1871), 35 Ind. 402); and a decree rendered in a cause instituted before the commencement of war, the parties to which resided on opposite side of the military line and were consequently enemies to each other, is without legal validity. Stephens *v.* Brown (1884), 24 W. Va. 234.

32. Bishop *v.* Jones (1866), 28 Tex. 294.

33. Johnson *v.* Harrison (1815), Litt. Sel. Cas. 226.

34. Hamersley *v.* Lambert (1817), 2 Johns. Ch. 508.

35. Elgee *v.* Lovell (1865), Woolw. 102, Fed. Cas. No. 4,344; Hutchinson *v.* Brock (1814), 11 Mass. 119; Levine *v.* Taylor (1815), 12 Mass. 8; Bell *v.* Chapman (1813), 10 Johns. 183; Luczycki *v.* Spanish River Pulp & Paper Mills Co. (1915), 34 Ont. L. Rep. 549.

36. Whelan *v.* Cook (1867), 29 Md. 1.

37. Dangler *v.* Hollinger Gold Mines (1915), 34 Ont. L. Rep. 78.

38. Howes *v.* Chester (1861), 33 Ga. 89.

39. Dumenko *v.* Swift Canadian Co. (1914), 32 Ont. L. Rep. 87.

But see in this connection the remarks of Boyd, C., in Luczycki *v.* Spanish River Pulp & Paper Mills Co. (1915), 34 Ont. L. Rep. 549, who said that "the Dumenko Case, as stated in the judgment, is

The court will refuse to dissolve an injunction against the enforcement of a judgment where since the injunction has been obtained the judgment creditors have become alien enemies.[40]

Where the plaintiff in a suit becomes an alien enemy after judgment, the court will not, on motion, stay or set aside the execution, but the defendant may avail himself of his remedy at law.[41]

According to an early case in the United States Supreme Court,[42] it would seem that if war breaks out during the pendency of a writ of error, the plaintiff in error cannot take advantage of the fact that the original plaintiff is an alien enemy, but the judgment may be affirmed; but a recent English case holds that an alien enemy who is plaintiff in an action commenced before the outbreak of war has no right of appeal, such right being suspended until the conclusion of peace.[43] Where

founded on Le Bret *v.* Patillon (1804), 4 East, 502, 7 Revised Rep. 618, and Brandon *v.* Nesbitt (1794), 6 T. R. 23, 3 Revised Rep. 109, 2 Eng. Rul. Cas. 649. Now in Brandon *v.* Nesbitt, the plaintiff was an alien enemy at the outset, and so was never rightly in court. Le Bret *v.* Patillon is in point, for there the action was rightly brought, but its course was intercepted by declaration of war. The defendant's contention was made by way of dilatory plea, and the judgment was that the plaintiff should be barred from further having and maintaining the action. Nothing is said as to costs, and in form the action was not dismissed. In the Dumenko Case the judgment may well be rested on the fact that the plaintiff was in default in giving security for costs. By the order, if security not given the action was to be dismissed. The plaintiff, the alien enemy, moved to obtain an extension of time, which favor will not be granted to an alien enemy, and the action was well dismissed, with costs."

40. Taylor *v.* Morgan (1812), 2 Mart. (La.) 263.

41. Vanbrynen *v.* Wilson (1808), 9 East, 321; Buckley *v.* Lyttle (1813) 10 Johns. 117.

42. Owens *v.* Hanney (1813), 9 Cranch, 180, 3 L. ed. 697.

43. Porter *v.* Freudenburg [1915], 1 K. B. 857, 5 B. R. C. 548.

And see also, to the same effect, Canadian Stewart Co. *v.* Terih (1915), 25 Q. B. R. 158, in which it was held that an appellee who is a nonresident alien enemy is not to be regarded as having the status in the appellate court of a defendant resisting the demand which the appellant makes to have the judgment reversed.

Where two coplaintiffs have given notice of appeal before the outbreak of war and one of them has on the outbreak of war become

he is a party defendant he may appeal against any decision, final or interlocutory, that may be given against him.[43a]

As Parties Defendant.

While the existence of war closes the courts of each belligerent to the citizens of the other, it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other whenever the latter can be reached by process;[44] since

44. Masterson *v.* Howard (1873), 18 Wall. 99, 21 L. ed. 764; Porter *v.* Freudenberg [1915], 1 K. B. 857, 5 B. R. C. 548.

the reason of policy which suspends the right of action of an alien enemy during the war does not apply where the suit is not by one of the enemy to collect his resources, but by a citizen to put himself in means.[45] A bill in equity may be brought against

an alien enemy, the appeal must be suspended during the war. Actien-Gesellschaft Für Anilin-Fabrikation *v.* Levinstein (1915), 31 Times L. R. 225, 32 R. P. C. 140, 112 L. T. N. S. 963 [1915], W. N. 85, 84 L. J. Ch. 842.

43a. Porter *v.* Freudenberg, supra.

45. Seymour *v.* Bailey (1872), 66 Ill. 288. In Dorsey *v.* Thompson (1872), 37 Md. 25, it is said: "Whether the ground of the defense of alien enemy be the possible benefit that might result to the enemy from allowing the plaintiff to recover, or the want of claim or right to the use of the courts of the country by the plaintiff, in consequence of his status as an enemy, the reason that creates the disability of the party as plaintiff does not apply to him as defendant. As plaintiff, the party attempts to exercise a privilege that he has forfeited, at least for the time; but, as defendant, he is sought to be made amenable for what justice may require of him. The mode and manner of acquiring jurisdiction, and making the proceedings binding on him, is another and a different question from that of his total exemption from suit pending hostilities. This depends upon the remedial processes of the courts; and, as is well known, they are generally wholly inadequate during a state of actual war in suits *in personam*, to furnish the foundation for exercising jurisdiction over alien enemies residing in the enemy's territory. But still these enemies are liable to be sued, if within the reach of process."

And see, also, to the same effect, Robinson *v.* Continental Ins. Co. [1915], 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125 [1914], W. N. 393, 59 Sol. Jo. 7; Cocks *v.* Izard (1871), Fed. Cas. No. 2,934; Russ *v.* Mitchell (1864), 11 Fla. 80; Buford *v.* Speed (1875), 11 Bush. 338; Dorsey *v.* Kyle (1869), 30

an alien enemy to remove a cloud on title, and service may be made by application.[46]

But though a nonresident alien enemy may be made a party defendant, he may not, of course, prosecute a counterclaim.[47]

The liability of an alien enemy to be sued carries with it the right to use all the means and appliances of defense.[48] He is entitled to appear by attorney and be heard in his defense. "It would be revolting to the rules of justice which govern a court to drag therein a party and then say to him, 'Although you were properly before the court, you are an alien enemy and shall not be heard, yet judgment shall be rendered against you.' "[49] He may appear by attorney to defend proceedings for the confiscation of his property, and may sue out a writ of error.[50] He

Md. 512, 96 Am. Dec. 617; McNair *v.* Toler (1875), 21 Minn. 175; De Jarnette *v.* De Giverville (1874), 56 Mo. 440; Compagnie Universelle de Telegraphie et de Telephonie sans Fil *v.* United States Service Corporation (1915), 84 N. J. Eq. 604, 95 Atl. 187; Griswold *v.* Waddington (1818), 15 Johns. 57; Rodgers *v.* Dibrell (1880), 6 Lea, 69.

46. Lee *v.* Rogers (1874), 2 Sawy. 549, Fed. Cas. No. 8,201.

47. Robinson *v.* Continental Ins. Co. [1915], 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914], W. N. 393, 59 Sol. Jo. 7.

48. Seymour *v.* Bailey (1872), 66 Ill. 288; and see also Compagnie Universelle de Telegraphie et de Telephonie sans Fil *v.* United States Service Corp. supra.

49. Russ *v.* Mitchell (1864), 11 Fla. 80.

There is no rule of common law which prevents a nonresident alien enemy appearing and conducting his defense. Robinson *v.* Continental Ins. Co. [1915], 1 K. B. 155. In this case the court, referring to the difficulties attending suit against a nonresident alien enemy, said: "In this case I understand that the presence of the alien enemy in this country at the trial is not necessary and is not contemplated, and no difficulty arises such as might otherwise be created by the impossibility of his getting here, and no question arises in this case as to whether an express license to come into this country is necessary, or whether a license would be implied from the fact of the process of the court, and I express no opinion upon it. It may be that in this case the war has so hampered the defendants in the preparation of their case, in their witnesses, or in other ways, that it would be right to grant them a postponement on those grounds. If any application is made to postpone the trial on grounds of that character, it will be dealt with on its merits."

50. McVeigh *v.* United States (1870), 11 Wall. 259, 20 L. ed. 80.

may have a discovery for the purpose of conducting his defense, just as he will be allowed process to compel the attendance of his witnesses.[51]

But it seems that in event of the defendant's succeeding in the action, no order which will entitle him to payment of costs during the war ought to be made, and his right to issue execution should be suspended until the cessation of the state of hostilities.[52]

An alien enemy who is respondent to a petition for revocation of a patent, and against whom the operation of a decree revoking the patent is suspended by an appeal, cannot claim that the hearing of the appeal must be suspended during the war.[52a]

A defendant's privilege of being sued in the county where he resides ceases when he voluntarily becomes an alien enemy.[53]

Although the enemy character of a defendant does not preclude the maintenance of an action against him, it is nevertheless essential to the rendition of a valid judgment that the court acquire jurisdiction. Unless he has some agent in the country upon whom process may be served, it is generally necessary to resort to service by publication; and whether jurisdiction may be acquired in this way is a controverted question. Inasmuch as intercourse between citizens of belligerent states is ordinarily unlawful, the status of an enemy differs from that of an ordinary nonresident defendant, and this has influenced some courts to hold that constructive service upon such an one is ineffectual.[54] According to other courts, however, it would seem that the non-intercourse rule is to be relaxed *pro hac vice,* since they hold that service by publication is good.[55]

51. Albretcht *v.* Sussmann (1813), **2** Ves. & B. 323, 13 Revised Rep. 110.

52. See Robinson *v.* Continental Ins. Co. [1915], 1 K. B. 155.

52a. Porter *v.* Freudenberg [1915], 1 K. B. 857, 5 B. R. C. 548.

53. Russ *v.* Mitchell (1864), 11 Fla. 80.

54. Sturm *v.* Fleming (1883), 22 W. Va. 404; Livingston *v.* Jordan (1869), Chase, 454, Fed. Cas. No. 8,415; Dorr *v.* Gibboney (1878), 3 Hughes, 382, Fed. Cas. No. 4,006; Selden *v.* Preston, 11 Bush, 191; Rockhold *v.* Blevins (1873), 6 Baxt. 115; Walker *v.* Day (1874), 8 Baxt. 77; Haymond *v.* Camden (1883), 22 W. Va. 180.

55. In Seymour *v.* Bailey (1872), 66 Ill. 288, it was held that a presidential proclamation, issued in pursuance of an act of Congress pro-

In a Maryland case,[56] the court, in discussing the validity of a judgment rendered against an alien enemy upon service by publication, said:

"The argument in favor of the appellant, stated in its strongest light, is this: The object of the order of publication, made under the law affecting an absent or nonresident defendant, is to notify and warn him to appear by a certain day in court and defend his rights; that no man can have those rights impaired in any court without an opportunity of so defending them, and no court has jurisdiction over them until it has afforded him such opportunity; that the notice thus given is equivalent to personal notice by the service of a writ, and all proceedings are void unless one notice or the other is given; that whilst war exists the notice by order of publication is utterly futile and unlawful, all intercourse between the citizens of the respective governments being prohibited; that it could not possibly reach the party for whom it was intended, because no communication could be had between the place of publication and the place where the party intended to be notified resided at the time; and even if by legal possibility such notice could reach him, still, being an enemy, he could not appear and defend; the notice, therefore, in this case was a notice which could not possibly reach the appellant, requiring him to do a thing which he could not possibly perform,—a notice impossible to be known, to do a thing impossible to be done,—and such an order of publication must by consequence be utterly futile, illegal and void. But a brief examination of the provisions, purpose, and object of the law relating to nonresident owners of property here situated, who are made defendants in chancery suits in this state affecting such property, will, we think, afford a sufficient answer to this argument. All that the law requires in such cases is that the court shall order notice to be given by publication in one or more newspapers, stating the substance and object of the bill, and warning the

hibiting all commercial intercourse with the enemy, does not suspend the operation of statutes authorizing the prosecution of suits against nonresident defendants upon constructive service by publication of notice, so as to deprive the courts in such cases of all jurisdiction and to render their proceedings null and void.

56. Dorsey *v.* Dorsey (1869), 30 Md. 522, 96 Am. Dec. 633.

nonresident to appear on or before a day fixed in its order, and show cause why the relief prayed should not be granted, such notice to be published as the court may direct, but not less than once a week for four successive weeks, three months before the day fixed by the order for the appearance of the party, and if he does not appear at the time stated, the court is then authorized to proceed in the case by passing a decree *pro confesso,* or taking testimony *ex parte,* and then to final decree upon the subject-matter. . . . Strict compliance with the requisites of the statute is demanded; but when this is done and the case has proceeded to final decree, the property sold, and title acquired thereunder, the courts will not listen to any evidence that the party has not or could not actually receive the notice or make his appearance. It is simply a statutory mode of conferring upon the court power to pass judgment on property, the subject-matter of suit within its jurisdiction, when the owner is beyond the reach of its process. The courts in such cases act upon the presumption of notice which they will not allow to be rebutted. The whole theory of the law of constructive notice rests upon this foundation. In numerous cases an equal impossibility of receiving and complying with the notice exists as in the case of war. A party may be sick or imprisoned in a distant land at such place and under such circumstances that within the time limited no notice could by any possibility reach him; but this or any other *vis major,* or act of God, will not oust the jurisdiction of the court over his property once obtained by pursuing the requirements of the statute, or defeat the title acquired under its final decree thereon. If war and residence in enemy's territory can be set up to avoid the proceedings and defeat the title, there is no good reason why any other cause creating an equal impossibility of receiving notice should not be allowed to have the same effect. This would defeat the very object of the law, embarrass judicial proceedings, and render insecure titles derived under judicial sales."

There is a third group of cases which, without going so far as to assert that jurisdiction may be acquired by constructive service over a nonresident enemy, hold that a citizen may be proceeded against by publication as an absentee, notwithstand-

ing he has become an adherent of the enemy.[57]

The same difference of opinion pervades the decisions on the question whether the property of a nonresident alien enemy may be reached by attachment.[58]

Where it is sought to enforce a mortgage, deed of trust, or other lien for the security of a debt, a further difficulty is raised

57. Thus in Dorsey *v.* Thompson (1872) 37 Md. 25, it was held that an alien enemy may be served by publication where he has become such since the commencement of the war, at which time he was a resident citizen.

In Ludlow *v.* Ramsey (1871), 11 Wall. 581, 20 L. ed. 216, it is held that if a party voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot complain of legal proceedings regularly prosecuted against him as an absentee.

In Peerce *v.* Carskadon (1870), 4 W. Va. 234, 6 Am. Rep. 281, a statute providing that if parties were in sympathy with the Rebellion, and had left their usual places of abode, and were out of the reach of civil process for ninety days, they were to be regarded as nonresidents, was held not to be invalid as violating vested rights or as an *ex post facto* law.

58. In Thomas *v.* Mahone (1872), 9 Bush, 111, it was held that it does not follow because a person is an alien enemy, with whom all unlicensed communication is forbidden, that resident creditors may not sue him and subject to the payment of their debts such of his property as may be found within the jurisdiction.

The land of a nonresident enemy may be sold for the payment of his debts. Crutcher *v.* Hord (1868), 4 Bush, 363.

The fact that a debtor is an alien enemy will not preclude from proceeding by attachment against his property. Mixer *v.* Sibley (1869), 53 Ill. 61; Selden *v.* Preston, 11 Bush. 191; Jenkins *v.* Hannan (1884), 26 Fed. 657.

A citizen creditor may sue by attachment to obtain satisfaction from a nonresident alien enemy debtor. Hepburn's Case (1830), 3 Bland, Ch. 95.

The property of one who voluntarily becomes an alien enemy is subject to attachment. "His being an alien enemy does not make him the less a nonresident debtor." Dorsey *v* Kyle (1869), 30 Md. 512, 96 Am. Dec. 617.

But in Haymond *v.* Camden (1883), 22 W. Va. 180, it was held that a suit instituted by a creditor during the war to enforce the payment of his debt by attachment against the property of a debtor who is in the position of an alien enemy, or to enforce a vendor's lien, is without legal sanction or authority, and all proceedings had therein are void.

by the contention that as payment of a debt during the war is unlawful, it is not legally due, and therefore that no resort may be had to the security.[59]

Some courts have, however, declined to give effect to the above contention where the debtor was originally a citizen of the state, but has become an adherent of the enemy,[60] apparently on the illogical ground that the conduct of such a person deserves to be visited with a penalty. These cases, which were occasioned by the Civil War, and the decisions in which may have been influenced by partisan feeling, are open to criticism as disregarding the legal right of all the citizens of a nation to take sides in a civil conflict, together with the consequence attaching to the status of belligerents so acquired.

A distinction between sales by judicial proceedings, and a sale under a power contained in a mortgage or deed of trust, is made in a United States Supreme Court case,[61] where it is said:

"The argument is that, inasmuch as all commercial intercourse

59. Kanawha Coal Co. *v.* Kanawha & O. Coal Co. (1870), 7 Blatchf. 391, Fed. Cas. No. 7,606; Walker *v.* Beauchler (1876), 27 Gratt. 511; Grinnan *v.* Edwards (1883), 21 W. Va. 347 Dean *v.* Nelson (1869), 10 Wall. 158, 19 L. Ed. 926; Lasere *v.* Rochereau (1873), 17 Wall. 437, 21 L. Ed. 694.

60. So, in Harper *v.* Ely (1870), 56 Ill. 179, it was held that a sale under a mortgage is valid where the mortgagor left the state for the purpose of engaging in hostilites.

The real estate of a nonresident enemy situated in the state may be subject to the payment of a debt contracted before the war began and secured by a mortgage on the property itself, executed and recorded while the debtor himself was a resident of the state. Dorsey *v.* Dorsey (1869), 30 Md. 522, 96 Am. Dec. 633.

And a bill of equity will not lie to redeem lands sold under a deed of trust on the ground that the maker was, when the land was sold, a member of the enemy's forces and a prisoner of war, where it further appeared that he had voluntarily become an alien enemy. Black *v.* Gregg (1875), 58 Mo. 565.

In Johns *v.* Slack (1875), 2 Hughes, 467, Fed. Cas. No. 7,363, it was held that lands might be sold to satisfy the vendor's claim for unpaid purchase money, though the purchaser was absent during war with the other belligerent power and had no notice of the motion for the sale, or of the sale itself.

61. Washington University *v.* Finch (1873), 18 Wall. 106, 21 L. Ed. 818.

So, also, in other cases it has been held that the absolute power to

was forbidden between the people of the loyal states and those residing in the insurrectionary district, both by virtue of the act of Congress and by the principles applicable to nations in a state of war, all processes for the collection of debts were suspended, and that the complainants being forbidden by these principles to pay the debt, there could be no valid sale of the land for default of such payment. The case before us was not one of sale by judicial proceeding. No aid of a court was needed or called for. It was purely the case of the execution of a power by a person in whom a trust had been reposed in regard to real estate, the land, the trustee, and the *cestui que trust* all being, as they had always been, within a state whose citizens were loyally supporting the nation in its struggle with its enemies. . . . The debt was due and unpaid. The obligation which the trustee had assumed on a condition had become absolute by the presence of that condition. . . . The power under which the sale was made was irrevocable. The creditor had both a legal and a moral right to have the power made for his benefit executed. The enforced absence of the complainants, if it be conceded that it was enforced, does not in our judgment afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed upon him before the war began. His power over the subject was perfect; the right of the holder of the note to have him exercise that power was perfect. Its exercise required no intercourse, commercial or otherwise, with the complainants. No military transaction would be interfered with by the sale. The enemy, instead of being strengthened, would have been weakened by the process. The interest of the complainants in the land might have been liable to confiscation

sell on default conferred upon the trustee in a deed of trust to secure a debt may be exercised notwithstanding the debtor is an alien enemy. De Jarnette *v.* De Giverville (1874), 56 Mo. 440 (where, however, it appeared that the time the default was made there was no suspension of intercourse between the state of the plaintiff and that of the defendant); Martin *v.* Paxson (1877), 66 Mo. 260 (where it appeared that the trustor had voluntarily gone within the enemy's lines); Mitchell *v.* Nodaway County (1883), 80 Mo. 257; Washington University *v.* Finch (1873), 18 Wall. 106, 21 L. Ed. 818; Willard *v.* Boggs (1870), 56 Ill. 163; Bush *v.* Sherman (1875), 80 Ill. 160.

by the government, yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country or any other is shown to us for this proposition. It rests upon inference from the general doctrine of absolute nonintercourse between citizens of states which are in a state of public war with each other, but no case has been cited of this kind even in such a war. It is said that the power to sell in the deed of trust required a notice of the sale in a newspaper, that this notice was intended to apprise the complainants of the time and place of sale, and that inasmuch as it was impossible for such notice to reach the complainants, no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspaper could never reach them to delay the sale indefinitely, or defeat it altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit by giving notoriety and publicity of the time, the terms, and the place of sale, and of the property to be sold, that bidders may be invited, competition encouraged, and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default and his property liable to sale at any time; and no notice to him is required.

Right to Habeas Corpus.

A prisoner of war is not entitled to the privilege of the writ of habeas corpus to examine into the propriety of his detention,[62] even though he is the subject of a neutral power and had been forcibly compelled to serve on board the enemy's ship where he was taken.[63] It has even been held that the court will not grant a habeas corpus ad testificandum to bring up a prisoner of war as a witness.[64]

The rule that the court will not entertain an application for habeas corpus from a prisoner of war has been held to apply to a civilian subject of an enemy state who has been interned as a measure of public safety.[65]

62. Three Spanish Sailors (1780), 2 W. Bl. 1324.

63. Rex. Schiever (1759), 2 Burr. 765.

64. Furly *v.* Newnham (1780), 2 Dougl. K. B. 419.

65. Rex *v.* Vine-Street Police Station (1915), 113 L. T. N. S. 971; Re Gusetu (1915), 29 Can. Crim. Cas. 427.